Supreme Court, U.S.
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No. 10-216

IN THE

Supreme Court of the United States

FREDERICK TARANTINO,

Petitioner,

v.

CITY OF HORNELL, TIMOTHY AIKEN, SHAWN HOGAN, JOE PELYCH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Second Circuit Court of Appeals err when it held:

1. "We find no error in the district court's grant of summary judgment to defendants on Tarantino's constitutional claims, and therefore affirm the judgment for substantially the same reasons set forth in the District Court's thorough and well-reasoned opinion."

2. "To the extent Tarantino presses a facial challenge to the provision of § 120-1 that prohibits the collection of rents on properties that lack the required Certificate of Occupancy, Hornell, N.Y., Municipal Code § 120-1(C)(1)(c), we conclude that this provision is rationally related to the legitimate governmental purpose of enforcing the substantive requirements of Hornell's municipal code relating to the inspection and certification of buildings within the City."

Tarantino v. City of Hornell, 09-2640-CV, 2010 WL 2025757 (2d Cir. May 24, 2010).

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OPINIONS BELOW

The decision of the Second Circuit Court of Appeals is not reported. (Petition Appendix A.) It may be located on-line at 2010 WL 2025757 (2d Cir. May 24, 2010).

The opinion of the District Court for the Western District of New York is reported at 615 F.Supp.2d 102 (W.D.N.Y. 2009). (Petition Appendix B.)

JURISDICTION

The Court of Appeals entered its judgment on May 24, 2010. The petition was filed on August 12, 2010. By letter dated September 14, 2010, from Clerk William K. Suter, Respondents were granted an extension of time to October 15, 2010, to respond to the petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983, which provides (in pertinent part):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The "Contracts Clause" of the United States Constitution, Article 1 - The Legislative Branch, Section 10 - Powers Prohibited of States (in pertinent part):

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts.

Section 1 of the Fourteenth Amendment to the United States Constitution (in pertinent part):

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 120-1 of the Municipal Code of the City of Hornell, New York, the full text of which is set out in the Appendices as follows:

> **Respondents' Appendix 1** (the Code provision in effect since September 1, 2005); and
>
> **Respondents' Appendix 2** (the Code provision in effect at the time of the events complained of by Petitioner).

COUNTER-STATEMENT OF THE CASE

I. Background to The Relevant Provisions of the City of Hornell Municipal Code

In 1975, the City of Hornell amended its laws[1] to add a provision that mandated:

> No property owner shall permit his property to be occupied by another unless or until it is in good repair, clean, sanitary, in habitable condition and in full compliance with all the provisions of the Code of the City of Hornell as certified through a certificate of occupancy to be issued by the Code Enforcement Officer of the City of Hornell.[2]

Two years later, the City of Hornell added a provision that mandated, in pertinent part:[3]

---

[1] Record, Defendants' Appendix Exhibit D, Document 28-6, p. 10 of 28.

[2] In 1992, when the Code was re-adopted by the City, this provision was renumbered to § 120-1(B)(1). Respondents' Appendix 2.

[3] Record, Defendants' Appendix Exhibit D, Document 28-6, p. 18 of 28.

> The owner of rental property within the City of Hornell is hereby required to immediately notify the City Code Enforcement Officer when any part of said rental property is vacated by tenants, and in no event can said property be rented to new or different tenants before a certificate of occupancy has been issued by the Code Enforcement Officer.[4]

In 2001, to address problems arising from a decaying housing stock often owned by absentee landlords, the City of Hornell added two preconditions to the issuance of a certificate of occupancy under Municipal Code § 120-1 - an insurance requirement and an agent requirement:[5]

> (3)As a precondition to the issuance of a certificate of occupancy, the landlord/owner of said rental property must supply the City of Hornell with a property insurance binder indicating that there is fire and liability insurance coverage for the property, which is subject to the certificate of occupancy. Said insurance binder shall list the City

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[4] This provision was renumbered to § 120-1(B)(2) in 1992. **Respondents' Appendix 2.**

[5] **Record, Defendants' Appendix Exhibit D, Document 28-7, pp. 4-5 of 31.**

of Hornell for cancellation purposes. If, during the term of a rental agreement, said insurance is cancelled and not renewed, then the occupancy permit for said property shall be deemed null and void for the purposes of this section of the law. This subsection shall take effect on January 1, 2002. [Added 8-27-2001]

(4)Prior to the issuance of a certificate of occupancy, [sic] within the City of Hornell, any and all landlords/property owners must designate an agent of at least 21 years of age, who resides in the City of Hornell, to accept legal service on behalf of the property owner/landlord. Prior to the issuance of a certificate of occupancy, the property owner/landlord must provide such information to the Codes Office for the City of Hornell. . . . All service of process in the event that said property owner/landlord needs to be served or given notice by the City of Hornell shall be deemed sufficient service for the purpose of the City Code if the City serves the landlord/property owner or his or her designated agent. This subsection shall take effect on January 1, 2002. [Added 8-27-2001]

The agent and insurance provisions of the Code, together with the requirement for a certificate of occupancy for all rental property, give rise to several of Petitioner's Questions Presented. *See* Petition, p. i (Questions 1-3).

In mid-2005, Section 120-1 of the Municipal Code was amended.[6] *See* **Respondents' Appendix 1.** Section 120-1, as amended, continues to include the insurance and agent provisions added to the Code in 2002. **Respondents Appendix 1**, at § 120-1(E) and (F). It also revised the requirement that all rental units must be inspected and certified by the Code Enforcement Office, by including a provision that certificates of occupancy remain valid for a 30 month period or until a change in tenants, at which times the certificate of occupancy must be renewed. *Id.*, at § 120-1(C)(1)(a).

The 2005 amendment also adds a provision for obtaining a search warrant in the event that the owner, agent or person in charge of the premises requests a warrant or refuses to permit a warrantless inspection (*id.*, at § 120-1(C)(2)), and a provision that addresses the effect of a rental prior to compliance with the certificate of occupancy requirement of the ordinance:

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[6] Record, Defendants' Appendix Exhibit D, Document 28-7, pp. 25-29 of 31.

> No owner, agent or person in charge shall collect rents during any period of noncompliance with the provisions of this part which would otherwise be due and owing for the rental of premises unless and until he or she shall have complied with the provisions herein. Nothing herein shall be construed to prevent a landlord, upon receipt of an occupancy permit, from receiving the equitable value of the occupancy of the premises from the earliest date of occupancy, but in no event shall a landlord recover in excess of the agreed rent.

Id., at § 120-1(C)(8). This rent section of the 2005 amendment to the ordinance gives rise to another of Petitioner's Questions Presented. *See* Petition, p. i (Question 4).

II. Statement of Facts

The District Court's Decision and Order addresses the factual background of the events that give rise to Petitioner's claims under the prior version of § 120-1 of the City of Hornell Municipal Code. *See* Petitioner's Appendix, pp. A6-A13.

At the time of the underlying events, Petitioner owned rental property on River Street and Davenport Street in the City of Hornell, New York. He also

owned a residence in Amherst, New York. He claims that he lived in one of his rental units on River Street during the week and in his Amherst home on the weekend. Petitioner's Appendix, pp. A6-A7.

By letter dated June 13, 2003, Petitioner and others who had failed to comply with the Code's new insurance and agent provisions were reminded of them by the Code Enforcement Office. Petitioner acknowledges that he was aware of the new Code provisions, that he received the June 2003 reminder letter, and that he never complied with the requirements. *Id.*, p. A8. Petitioner also admits that he had rented his Davenport Street property to a new tenant in September 2004. *Id.*

Based on a September 2004 telephone call to the City of Hornell Code Enforcement Office from the new tenant, the Code Enforcement Officer sent Petitioner a letter dated September 24, 2004, addressed to Petitioner at his River Street address, informing him of the lack of a current certificate of occupancy and advising him that, in order to obtain the new certificate as required by the new rental, he must comply with all relevant Code provisions. Plaintiff admits he received this letter. Petitioner's Appendix, pp. A8-A9.

Petitioner's unsupported belief – that his property was visited by a Code Enforcement Officer as a result of the call from his new tenant (*id.*, pp. A8-A9) – formed the basis of his Fourth Amendment claim below.[7]

The Code Enforcement Officer initially tried to work with Petitioner regarding his failure to comply with the Code. The Officer's September 24, 2004, letter to Petitioner at his River Street address was admittedly received – and ignored – by him. Petitioner's Appendix, p. A9. Thus, on October 7, 2004, the Officer issued an information and appearance ticket regarding the violation of § 120-1(B)(2), based on Petitioner's failure to obtain a new certificate of occupancy prior to re-renting the premises. *Id.*

On November 23, 2004, Petitioner read a statement concerning his belief in the unconstitutionality of the Code provisions related to rental property into the minutes at a Common Council meeting.[8] The Code Enforcement Officer was not

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[7] Petitioner cites the Fourth Amendment as a Constitutional provision implicated by his Petition, but the Fourth Amendment claim is neither raised in Petitioner's Questions Presented nor referred to in his statement of Reasons for Granting the Writ. *Compare* Petition, pp. i-ii, 2, 5, with Petition, pp. 8-9.

[8] Record, Defendants' Appendix Exhibit D, Document 28-7, pp. 9, 11-13, 17-22 of 31.

present at the meeting.[9] On November 24, 2004, the local newspaper carried a story about the meeting and quoted the Mayor's opinion of the statement. *Id.*, pp. A10-A11.

When the Code Enforcement Officer returned to the Code Office on November 30, 2004, after an extended absence for personal reasons, he determined that the certified letter containing the October 7, 2004, ticket had never been successfully delivered to Petitioner at his River Street address. *Id.*, p. A10. Accordingly, the Officer issued an additional information and appearance ticket alleging a violation of § 120-1(B)(3), the agent requirement. *Id.*, p. A26. Further, because the Petitioner's property file contained no insurance binder, the Officer issued an information and appearance ticket alleging a violation of § 120-1(B)(4), the insurance provision.

The Code Enforcement Officer then contacted Petitioner at his place of employment and arranged an in-person meeting with him, at which time he personally served Petitioner with all three of the tickets. Petitioner's Appendix., p. A11. The charges against Petitioner were later withdrawn by the City. *Id.*, p. A12.

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[9] In the District Court, Petitioner raised a retaliation claim under the First Amendment related to his reading of this statement and he cites the First Amendment as a Constitutional provision implicated by his Petition, but his retaliation claim is neither raised in Petitioner's Questions Presented nor referred to in his statement of Reasons for Granting the Writ. *Compare* Petition, pp. i-ii, 2, 6, with Petition, pp. 8-9.

Petitioner's rental units are vacant. Petition, p. 6.

III. The Opinions Below

A. The District Court Opinion

The District Court granted summary judgment to Defendants and dismissed the complaint in its entirety after a painstaking analysis of each of Petitioner's constitutional claims.

1. The Fourth Amendment Claim

Petitioner's Fourth Amendment search claim was rejected by the Court on the ground that he lacked standing to raise the claim: As a landlord, he had no reasonable expectation of privacy in tenant-occupied rental property; and the evidence, viewed in the light most favorable to Petitioner as the non-moving party, establishes that, if there in fact had been a search of the rental premise, it was the result of a request for such by the new tenant and thus made on consent of an occupant. Petitioner's Appendix, pp A13-A18.

2. The Equal Protection Claim

Because Petitioner did not allege discrimination based on membership in a protected group, the District Court analyzed his equal protection claim under principles of selective enforcement and class-of-one. *Id.*, pp. A22, A25. The Court found, as to the selective enforcement claim, that "plaintiff has failed to show that he and the other landlords that he has identified were similarly situated in all material respects, that he was in fact selectively treated as compared to those other landlords, or that any difference in treatment was motivated by constitutionally impermissible purposes." *Id.*, p. A25. The Court also rejected, for essentially the same reasons, Petitioner's equal protection claim under class-of-one principles, adding that plaintiff established neither the requisite high degree of similarity between himself and the persons to whom he compared himself (*id.*, pp. A32-A33), nor that the alleged difference in treatment resulted from non-discretionary governmental action (*id.*, pp. A33-A34).

3. The Facial Challenge to the 2005 Ordinance

The District Court addressed Petitioner's facial challenge to the 2005 version of § 120-1 under the "rational basis" test, which the Court described as a highly deferential test that seeks only to determine whether a reasonable rational relationship exists between the ordinance and a legitimate governmental

end.[10] Petitioner's Appendix, pp. A35-A36. The District Court found that plaintiff had failed to meet his heavy burden to "'negative every conceivable [rational and legitimate] basis which might support' the ordinance." *Id.*, p. A36-A38 (quoting *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 75 (2001)). The Court expressly found that legitimate governmental interests were discussed by the 2001 City of Hornell Common Council meeting concerning the agent and insurance provisions of the ordinance (*id.*, pp. A37-A38), and held that the 2005 version of the ordinance "easily passes constitutional muster." *Id.*, p. A39.

4. The Due Process Claim

The complaint alleged a violation of plaintiff's due process rights, but, as plaintiff never responded to arguments concerning it on the summary judgment motion, the District Court presumed he had dropped it. *Id.*, p. A.40. In any event, the Court found no denial of procedural due process, as the evidence established that plaintiff was given notice and an opportunity to be heard (*id.*, p. A41), and it found that there was no evidence that the defendants had engaged in any egregious or outrageous conduct such as would support a substantive due process claim. *Id.*

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[10] The District Court found that plaintiff's challenge to provisions that were no longer in the ordinance after the 2005 amendments were moot. Petitioner's Appendix, p. A37, n. 13.

5. First Amendment Claim

The District Court determined that plaintiff's First Amendment claim – that he was retaliated against for having spoken out at the Common Council meeting in November 2004 – "suffer[s] from several fatal defects." *Id.*, p. A42. Petitioner could not plead or prove, as required by *Hartman v. Moore*, 547 U.S. 250, 125 S.Ct. 2977, 164 L.Ed.2d 441 (2006), the lack of probable cause for his prosecution. On its face, the ordinance's agent provision applies to all owners of rental property. Thus, because Petitioner did not dispute that he had not named an agent for service, there was probable cause for the prosecution. *Id.*, p. A43. Moreover, even had the agent provision applied only to non-resident owners, the inability of the Code Enforcement Officer to serve Petitioner at his local address, as evidenced by the unclaimed certified mailings, provided probable cause. *Id.*, pp. A44-A46. The prosecution on the insurance provision was also supported by probable cause, as Petitioner never contended that he supplied proof of coverage to the City. Finally, Petitioner did not show that his First Amendment rights were actually chilled by the prosecution; in fact, he never presented any evidence that he changed his behavior in any way after the tickets were served on him on November 30, 2004. *Id.*, pp. A47-A48.

6. Section 1983 Malicious Prosecution Claim

The District Court held that Petitioner's malicious prosecution claim was subject to summary judgment for several reasons. First, probable cause supported the issuance of the appearance tickets. *Id.*, p. A49. Second, the proceedings were not terminated in Petitioner's favor. *Id.*, pp A49-A51. Third, Petitioner never presented evidence that he was deprived of a constitutionally protected liberty interest as a result of the tickets. *Id.*, p. A51-A52.

7. Contracts Clause Claim

The District Court recognized that the issue as to whether an individual can assert a § 1983 cause of action for violation of rights under the Contracts Clause is an open question. Nevertheless, it assessed Petitioner's claims regarding the ordinance's alleged impairment of his insurance and rental contract rights on the merits and found them subject to dismissal on summary judgment. *Id.*, p. A52-A53. Petitioner remains able to enter into an insurance contract; he simply must meet certain conditions before he may obtain a certificate of occupancy for rental property. *Id.*, p. A53. Further, Petitioner presented no evidence that indicated that an existing contractual relationship with a tenant was impaired as a result of the ordinance, nor evidence that the ordinance's requirements and restrictions were unjustified. *Id.*, p. A54.

B. The Second Circuit Court of Appeals' Opinion

After reviewing the District Court's summary judgment order *de novo* (*id.*, p. A3), the Second Circuit Court of Appeals affirmed the grant of summary judgment to Defendants "for substantially the same reasons set forth in the District Court's thorough and well-reasoned opinion. *Id.*, p. A4. In addition, it examined Petitioner's facial challenge to § 120-1(C)(1)(c) of the Code, as amended in 2005, regarding the prohibition against rent collection on property that lacks the required certificate of occupancy, and "conclude[d] that this provision is rationally related to the legitimate governmental purpose of enforcing the substantive requirements of Hornell's municipal code relating to the inspection and certification of buildings within the City." *Id.*

ARGUMENT

Petitioner seeks a writ of certiorari from the 2010 decision of the Second Circuit affirming the District Court's 2009 grant of summary judgment dismissing his complaint. He specifically challenges the 2005 City of Hornell ordinances that impose certain preconditions to obtaining a required certificate of occupancy for rental property, specifically, proof of fire and liability insurance coverage on the property and the appointment of a resident agent for service of process. Petitioner argues that the ordinance provisions unconstitutionally discriminate between rental property owners and owner-occupiers, and that the agent provision interferes with his property rights by forcing him to delegate the right to accept service of process to a local agent. Petition, p. 8. Petitioner also claims that the rent provision deprives him of rent on his rental units.

The decisions below were correctly decided. Petitioner's claims do not warrant the grant of certiorari by this Court.

POINT I:

PETITIONER LACKS STANDING TO CHALLENGE THE 2005 CITY OF HORNELL ORDINANCES

Petitioner states in his challenge to the 2005 provisions of the City of Hornell Municipal Code that his rental units have remained vacant since the beginning of this action. Petition, p. 6. However, nothing in the Petition links the vacancy of his rental units to the ordinances he challenges. Petitioner does not state that the *reason* the units are vacant is because he has not been able to obtain a certificate of occupancy for the units. He does not claim that he has been unable to meet the preconditions for obtaining a certificate of occupancy because no one would sell him insurance covering the property and no one would agree to serve as a local agent for his units. He also does not claim that he has met the conditions for issuance of a certificate of occupancy but has nevertheless been denied one by the City of Hornell. He also does not claim that his units are covered by certificates of occupancy but that he has nevertheless been unable to rent the units to prospective tenants because they balk at the ordinances. He merely states that the units are vacant. Thus Petitioner's challenges to the ordinances are in essence solely theoretical.

> In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or

> controversy" between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth v. Seldin, 422 U.S. 490, 498-99, 95 S. Ct. 2197, 2205, 45 L. Ed. 2d 343 (1975) (quoting . *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)). "Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Id.*, 422 U.S. at 450, 95 S.Ct. at 2206. "Standing has always depended on whether a plaintiff has a 'personal stake in the outcome of the controversy.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 114, 103 S. Ct. 1660, 1671, 75 L. Ed. 2d 675 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)).

Nothing in Petitioner's proof on the summary judgment motion below, or contained in his Petition, suggests that he has a personal stake in the outcome of this controversy, and therefore nothing in his

Petition warrants the Court's exercise of its remedial powers on Petitioner's behalf.

POINT II:

CERTIORARI IS NOT WARRANTED; THE CHALLENGED ORDINANCE PROVISIONS ARE RATIONALLY RELATED TO LEGITIMATE GOVERNMENTAL CONCERNS

In any event, the ordinances are proper and reasonable exercises of the City of Hornell's police powers, and as such, there is no basis on which to grant certiorari in this case.

This Court has "consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440, 102 S.Ct. 3164, 3178, 73 L.Ed.2d 868 (1982); *see Pennell v. City of San Jose*, 485 U.S. 1, 12, n. 6, 108 S.Ct. 849, 858, n. 6, 99 L.Ed.2d 1 (1988).

"'[A] classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose.'" *Central State University v. American Ass'n of University Professors, Central State Univ. Chapter*, 526 U.S. 124, 127-28, 119 S. Ct. 1162, 1163,

143 L. Ed. 2d 227 (1999) (quoting *Heller v. Doe*, 509 U.S. 312, 319-321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations omitted); citing *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992)). Indeed, the Equal Protection standard is to be assessed deferentially:

> [A]ppellees need only show that the classification scheme embodied in the Ordinance is "rationally related to a legitimate state interest." . . . "[W]e will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."

Pennell v. City of San Jose, 485 U.S. 1, 14, 108 S. Ct. 849, 859, 99 L. Ed. 2d 1 (1988) (quoting *New Orleans v. Dukes*, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976); *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 943 59 L.Ed.2d 171 (1979)).

Moreover, the Court "has consistently refused to invalidate on equal protection grounds legislation which it simply deemed unwise or unartfully drawn." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 175-76, 101 S. Ct. 453, 459-60, 66 L. Ed. 2d 368 (1980).

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." . . . "The problems of government are practical ones and may justify, if they do not require, rough accommodations - illogical, it may be, and unscientific." . . . "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

Dandridge v. Williams, 397 U.S. 471, 485, 90 S. Ct. 1153, 1161, 25 L. Ed. 2d 491 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911); *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 69-70, 33 S.Ct. 441, 443, 57 L.Ed. 730 (1913); *McGowan v. Maryland*, 366 U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393 (1961)).

Petitioner presented no evidence that the ordinances at issue here are irrational or invidious; indeed, it is evident from the record of the Common

Council meetings[11] that the City enacted the ordinances as reasoned and practical efforts to address the City's very real problems presented by a deteriorating rental housing stock and absentee landlords. The requirement for a rental property to be covered by insurance is sufficiently supported by the City's negative experiences with rental property that had been allowed to deteriorate to a dangerous or dilapidated condition, thereby subjecting its tenants to the risk of peril and, ultimately, the City to significant expense. Further, it is reasonable for the City to distinguish between rental property and owner-occupied property with respect to the insurance requirement, as the latter clearly has a direct stake in insuring the property in which he resides, while the former, who may be in rental property just for the income potential, has been known to just walk away from damaged or damage-producing properties.

The requirement that a local agent be named for service of process, too, is a reasonable effort to deal with the problems resulting when absentee landlords buy up cheap City housing, collect rents on properties that are allowed to deteriorate, and then are completely unreachable when it is time to address charges for Code violations or other City issues with the property. In addition, the rent provision of the 2005 ordinance – that rent may not be collected unless the property has a current certificate of occupancy – is a reasonable effort to ascertain that the rental

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[11] Record, Defendants' Appendix Exhibit D, Document 28-7, pp. 3-4, 25-29 of 31.

property is inspected before it is re-rented and then again at 30 month intervals, thereby ensuring that the structure remains in a safe and habitable condition. This rent provision is a carefully drawn ordinance that expressly permits the landlord to obtain the equitable value of the rental (in other words, the rent) once the certificate of occupancy is issued; it merely prohibits rent collection during the period that the property is not covered by a current certificate of occupancy.

Accordingly, because the ordinance is a reasonable, rational, and equitable response to legitimate governmental concerns, Petitioner raises no issue that warrants the grant of certiorari in this case.

POINT III:

PETITIONER HAS NO VALID § 1983 CONTRACT CLAUSE CLAIM

To the extent that Petitioner's argument is that the ordinances violate his rights under the Contracts Clause of the Constitution, the claim also does not require certiorari to be granted. It is true that, as the District Court decision points out, the issue of whether an individual may assert a § 1983 claim based on an alleged violation of the Contracts Clause is not clear-cut.

In the 1991 decision, *Dennis v. Higgins*, in which the majority held that suits for violations of the Commerce Clause could be brought under § 1983,

Justice Kennedy, in a dissent in which Chief Justice Rehnquist joined, stated:

> In our only previous case discussing a § 1983 claim brought for the violation of a supposed right secured by Article I of the Constitution, we held that violation of the Contracts Clause does not give rise to a § 1983 cause of action. *Carter v. Greenhow*, 114 U.S. 317, 5 S.Ct. 928, 29 L.Ed. 202 (1885). . . . [T]he Court held that the Contracts Clause can be said to secure individual rights "only indirectly and incidentally." *Id.*, at 322, 5 S.Ct., at 930. The Court further explained that the only right secured by the Contracts Clause is the "right to have a judicial determination, declaring the nullity of the attempt to impair [a State's] obligation." *Ibid.*

Dennis v. Higgins, 498 U.S. 439, 457, 111 S. Ct. 865, 876, 112 L. Ed. 2d 969 (1991) (in dissent).

Since then, the Ninth Circuit Court of Appeals in *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885 (9th Cir. 2003), has found a private right under § 1983, while the Second Circuit Court of Appeals, in *Haley v. Pataki*, 106 F.3d 478, 482, n. 2 (2d Cir. 1997), indicated its uncertainty as to whether there was such a right. Petitioner's Appendix, pp. A52-A53.

Thus, given the dissent in *Dennis* and the Circuit Courts' discrepencies, it is evident that the time will come when this issue must be directly addressed by this Court. But this Petition does not provide the Court with an appropriate avenue for a discussion of the proper interplay between § 1983 and the Contracts Clause.

This Court has said that an inquiry into a party's Contract Clause claim "has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial." *General Motors Corp. v. Romein*, 503 U.S. 181, 186, 112 S. Ct. 1105, 1109, 117 L. Ed. 2d 328 (1992). Petitioner has not met even one of the three components, never mind all three of them.

First, Petitioner has neither submitted evidence of nor even alleged a contractual relationship. He provided no evidence of a insurance contract giving rise to a contractual relationship with an insurance company concerning his rental property nor evidence of a rental contract with a tenant. Therefore, Petitioner cannot meet even the first component of the inquiry – the fact of a contractual relationship.

Further, Petitioner's ability to enter into an insurance contract or rental contract is not impaired by the new Code provisions. The insurance and agent provision merely sets out certain conditions before the City will issue a certificate of occupancy. The

insurance pre-condition requires only that the property is covered by insurance and that the City will be advised if the policy is cancelled. Petitioner's *ability* to enter into such contractual relationships is wholly unaffected; it is simply made mandatory if he wants to obtain a certificate of occupancy for the property. Likewise, the pre-condition that all rental property owners name a local agent to accept service of process regarding the property, and the 2005 amendment regarding rent collection, have no effect on any contractual relationship with a tenant. This is particularly true, given that Petitioner in fact has no tenants; he has let his property sit vacant rather than seek a certificate of occupancy for it. Petition, p. 6. Petitioner neither alleges nor evidences any facts to establish that he experienced an impairment of any degree in a contractual relationship. Therefore Petitioner does not meet the second component of the inquiry.

Thus, this case – at best – presents only a theoretical situation for the Court to address under the Contract Clause. For that reason, Petitioner's unsubstantiated claim that his rights under the Contract Clause have been impaired by § 120-1 of the Municipal Code of the City of Hornell does not warrant the grant of certiorari in this case.

Furthermore, even if Petitioner had shown some form of impairment, the ordinances – as a reasonable and limited exercise of the City's police powers – withstand scrutiny under the Contract Clause.

> "[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.'"

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 503, 107 S. Ct. 1232, 1251, 94 L. Ed. 2d 472 (1987) (quoting *Manigault v. Springs*, 199 U.S. 473, 480, 26 S.Ct. 127, 130, 50 L.Ed. 274 (1905)). *See* Petitioner's Appendix, pp. A54-55.

Accordingly, the Contract Clause does not provide a basis on which to grant certiorari to the Petitioner.

CONCLUSION

The District Court correctly granted summary judgment dismissing the complaint, and the Second Circuit Court of Appeals correctly affirmed that decision. There is no ground on which to grant certiorari in this case.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX 1

Municipal Code of the City of Hornell, New York, § 120-1, Residential Occupancy Permits (as amended effective September 1, 2005):[1]

A. Title. This section shall be known as the "Residential Occupancy Permit Provisions" and is supplementary to applicable provisions of the City Code for the City of Hornell.

B. Purpose and scope. The purpose and scope is to provide uniform administration and compliance with residential occupancy permits and to establish the responsibilities of parties concerned therewith.

C. Inspection and certification of premises.

(1) General.

(a) All residential rental dwelling units and commercial rental units shall be inspected and certified by the Code Enforcement Office of the City of Hornell (hereinafter "the Department"), which shall determine compliance with, administer and enforce all applicable provisions of this code. On and after September 1, 2005, residential occupancy permits

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[1] This Code provision is available on-line at http://www.ecode360.com/?custId=HO1346.

shall be valid for 30 months from the date of issuance. The vacancy of any unit shall invalidate said permit even if said vacancy shall occur within said 30 months.

(b) Nothing contained herein shall be construed or operate to invalidate an otherwise legally effective permit or certificate issued prior to September 1, 2005, except that such permit or certificate shall be valid only until March 31, 2008, or a change in the tenancy of the residential rental dwelling unit to which the permit or certificate relates, whichever first occurs.

(c) Except as otherwise provided herein, it shall be unlawful and a violation of this chapter to rent, lease, sell on a land contract or otherwise allow the occupancy of any residential or commercial rental unit without the inspection and certification as required herein.

(d) If, upon inspection, said premises do not comply with all applicable provisions of this code or the Uniform Code, the specific reasons for noncompliance shall be

specified in writing in a notice and order, as provided. The notice and order shall be provided to the owner or the owner's agent. Occupants or proposed occupants of dwellings shall have the right to inspect the certificate of occupancy of the residential rental dwelling unit, apartment or multiple residence in which they have an interest at no cost.

(2) On or after September 1, 2005, the Department shall have the right to inspect all or any part of the rental dwelling, including any unit or apartment, or entire multiple residence as required herein and/or upon complaint, except that the owner, agent or person in charge thereof shall have the right to insist upon the procurement of a search warrant from a court of competent jurisdiction by the Chief of the Department, or his or her designee, in order to enable such inspection. The officials charged with conducting the inspection shall be required to obtain a search warrant whenever an owner, agent or person in charge refuses to permit a warrantless inspection of the premises after having been advised that he or she has a constitutional right to refuse entry of the officials without a search warrant.

(3) The officials charged with conducting the inspection shall make such inspection, access and circumstances permitting, within three business days of receipt of a request from the owner, agent or occupant.

(4) An owner, agent or occupant may file with the Department a request for such inspection and the issuance of a residential occupancy permit by regular mail or in person at the office of the Chief of the Department.

(5) Nothing herein shall be construed to limit the right of the Department to inspect any property at any time. If, after issuing a residential occupancy permit, the Department received a complaint alleging a violation of this chapter, other than a violation that creates an imminent hazard to the public health or to the physical or mental health of the occupants of the rental property, the Department shall make a good-faith effort to notify the owner or agent of the complaint by either telephone or regular mail, before conducting an inspection under this chapter, and shall provide to the owner or agent one working day to explain what steps the owner or agent is taking to correct the violation. The Department may take steps necessary, by inspection

or other means, to assure that the violation is corrected.

(6) No occupancy permit shall be issued unless and until the fee(s) required are paid in full to the Department.

(7) No occupancy permit shall be issued unless the rental dwelling unit is an authorized use pursuant to zoning, and until all other applicable provisions and requirement of the Code of the City of Hornell are complied with and met.

(8) No owner, agent or person in charge shall collect rents during any period of noncompliance with the provisions of this part which would otherwise be due and owing for the rental of premises unless and until he or she shall have complied with the provisions herein. Nothing herein shall be construed to prevent a landlord, upon receipt of an occupancy permit, from receiving the equitable value of the occupancy of the premises from the earliest date of occupancy, but in no event shall a landlord recover in excess of the agreed rent.

(9) These provisions shall not apply to dwellings designed and used exclusively for occupancy as hotels, motels,

transient homes or establishments of like nature.

D. Temporary occupancy permit. The Department may cause to be issued at its discretion a temporary occupancy permit following an initial inspection, which temporary occupancy permit shall be subject to review and revocable at the discretion of the Department. No temporary occupancy permit may be issued in cases where fire safety is involved, such as defective electrical wiring, the absence of either an operating smoke detector or, after September 1, 2005, a carbon monoxide detector where required, or improper or inadequate means of egress and other conditions of like nature.

E. As a precondition to the issuance of an occupancy permit, the landlord/owner of said rental property must supply the City of Hornell with a property insurance binder indicating that there is fire and liability insurance coverage for the property, which is subject to the occupancy permit. Said insurance binder shall list the City of Hornell for cancellation purposes. If, during the term of a rental agreement, said insurance is cancelled and not renewed, then the occupancy permit for said property shall be deemed null and void for the purposes of this section of the law. This subsection shall take effect on September 1, 2005.

F. Prior to the issuance of an occupancy permit within the City of Hornell, any and all landlords/property owners must designate an agent of at least 21 years of age, who resides in the City of Hornell, to accept legal service on behalf of the property owner/landlord. Prior to the issuance of an occupancy permit, the property owner/landlord must provide such information to the Codes Office for the City of Hornell. Said information must include the name, address and telephone number of such designated agent. All service of process in the event that said property owner/landlord needs to be served or given notice by the City of Hornell shall be deemed sufficient service for the purpose of the City Code if the City serves the landlord/property owner or his or her designated agent. This subsection shall take effect September 1, 2005.

G. Penalties for offenses. Any person who shall violate or assist in the violation of these provisions or who fails to comply with a notice and order issued by the Department under these provisions shall, upon conviction, be punished by a fine of not less than $250 nor more than $500 each day a violation exists.

H. This section shall be effective on September 1, 2005.

APPENDIX 2

The Prior Code Provision:

Municipal Code of the City of Hornell, New York, § 120-1, Residential Occupancy Permits

As this Code Provision is no longer in effect, a copy of Chapter 120 of the City of Hornell Municipal Code in effect at the time of the events (2004) complained about in the underlying action is attached hereto.

In addition to the attachment, the relevant provisions are also set forth below:

Section 120-1. Constituents of unsafe building; certificate of occupancy required for all property. [Amended 7-28-1975; 6-27-1977; 5-26-1987]

A. All buildings or structures which are structurally unsafe, unsanitary or not provided with adequate egress or which constitutes a fire hazard or are otherwise dangerous to human life or which, in relation to existing use, constitute a hazard to safety or health by reason of inadequate maintenance, dilapidation, obsolescence or abandonment are, severally, for the purpose of this chapter, unsafe buildings.

B. Certificate of occupancy required.

(1) No property owner shall permit his property to be occupied by another unless or until it is in good repair, clean, sanitary, in habitable condition and in full compliance with all the provisions of the Code of the City of Hornell as certified through a certificate of occupancy to be issued by the Code Enforcement Officer of the City of Hornell.

(2) The owner of rental property within the City of Hornell is hereby required to immediately notify the City Code Enforcement Officer when any part of said rental property is vacated by tenants, and in no event can said property be rented to new or different tenants before a certificate of occupancy has been issued by the Code Enforcement Officer. A violation of any part of this section shall subject the owner thereof to a mandatory minimum fine of $250.

(3) As a precondition to the issuance of a certificate of occupancy, the landlord/owner of said rental property must supply the City of Hornell with a property insurance binder indicating that there is fire and liability insurance coverage for the property, which is

subject to the certificate of occupancy. Said insurance binder shall list the City of Hornell for cancellation purposes. If, during the term of a rental agreement, said insurance is cancelled and not renewed, then the certificate of occupancy issued for said property shall be deemed null and void for the purposes of this section of the law. This subsection shall take effect on January 1, 2002. [Added 8-27-2001]

(4) Prior to the issuance of a certificate of occupancy, within the City of Hornell, any and all landlords/property owners must designate an agent of at least 21 years of age, who resides in the City of Hornell, to accept legal service on behalf of the property owner/landlord. Prior to the issuance of a certificate of occupancy, the property owner/landlord must provide such information to the Codes Office for the City of Hornell. . . . All service of process in the event that said property owner/landlord needs to be served or given notice by the City of Hornell shall be deemed sufficient service for the purpose of the City Code if the City serves the landlord/property owner or his or her designated agent. This subsection shall take effect on January 1, 2002. [Added 8-27-2001]